

- (1) What is the nature and extent of the claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant suffered an injury arising out of and in the course of her employment with the respondent on June 26, 1991, resulting in a five percent (5%) permanent partial functional impairment to the right upper extremity.

The claimant, a six and one-half year employee for the City of Wichita, suffered an injury to her right upper extremity when a utility box lid fell on her arm on June 26, 1991, causing a screw to penetrate her right elbow. Claimant was referred to the emergency room and later referred to Dr. J.S. Toohey and Dr. George L. Lucas. Dr. Lucas, a board certified orthopedic surgeon, examined and treated claimant over a several month period of time seeing claimant 13 times in all. During his multiple examinations, Dr. Lucas found claimant's complaints to consist of right hand numbness, night awakenings, and elbow pain and tenderness. At no time did claimant allude to shoulder complaints.

Dr. Lucas recommended stellate ganglion blocks which occurred on two occasions. After the first injection claimant experienced relief on a temporary basis but unfortunately the symptoms, including the numbness to her right hand, returned. The second injection granted claimant some relief from the pain but the numbness in the hand was not affected. Dr. Lucas found claimant's symptoms to exceed that which would be expected from this type of injury and concluded a psychological problem existed here. The claimant was referred for an MMPI, which confirmed the doctor's diagnosis of a psychogenic pain disorder. Dr. Lucas opined claimant had no functional impairment as a result of this injury but restricted her from lifting weights in excess of 20 pounds and cautioned that she avoid vibratory tools.

The claimant was examined by Dr. Ernest R. Schlachter at the request of her attorney on January 21, 1993. Dr. Schlachter found claimant to experience elbow and hand pain, periodic numbness, with pain extending up the arm and into the shoulder. During his physical examination he found claimant to have a full range of motion in her shoulder with mild crepitus and some shoulder girdle tenderness. He diagnosed a chronic strain of the right shoulder girdle and upper extremity and assessed claimant a five percent (5%) permanent partial impairment to the body as a whole on a functional basis for the shoulder and a five percent (5%) permanent partial impairment on a scheduled basis to the right upper extremity. He restricted claimant from lifting more than five pounds with her right upper extremity, and cautioned that she avoid excessive pushing and pulling with the right arm.

When questioned regarding the causal factors related to the shoulder, Dr. Schlachter was unable to say within a reasonable degree of medical probability if the shoulder was related to the accident. When again questioned specifically on this subject, Dr. Schlachter deferred to the Administrative Law Judge, opining that he did not know whether the shoulder was related to the original injury. He later testified that the shoulder complaints were not related to the accident which occurred on June 26, 1991, that it would have to be something that occurred subsequent to the date of injury.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

In this instance Dr. Lucas, the treating physician, had no record of claimant alleging shoulder complaints during the 13 times he had the opportunity to examine and treat her. Dr. Schlachter, the claimant's chosen medical examiner, was unable to say within a reasonable degree of medical probability whether the shoulder problems were caused by the injury of June 26, 1991.

The Appeals Board finds after reviewing the entire record, that claimant has suffered an injury to her right upper extremity as a result of the accident of June 26, 1991. The opinion of Dr. Schlachter assessing claimant a five percent (5%) functional impairment to the right upper extremity appears to be supported by the credible evidence and is adopted by the Appeals Board as appropriate.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated March 28, 1994, should be and is modified and an award of compensation is herein entered in favor of the claimant, Virginia L. Ruyle, and against the respondent, City of Wichita, a self-insured, for a five percent (5%) permanent partial impairment of function to the right upper extremity.

Claimant is entitled to 18.29 weeks of temporary total disability compensation at the rate of \$248.91 per week for a total of \$4,552.56 followed by 9.59 weeks of permanent partial disability at the rate of \$248.91 per week totalling \$2,387.05 for a total award of \$6,939.61 all of which is due and owing in one lump sum minus any amounts previously paid.

The Appeals Board finds claimant is further entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536 and amendments thereto.

The fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

KELLEY, YORK & ASSOCIATES Deposition of Virginia L. Ruyle	\$ 156.30
BARBER & ASSOCIATES Deposition of Ernest R. Schlachter, M.D.	\$ 128.00
COURT REPORTING SERVICE Deposition of George L. Lucas, M.D.	\$ 129.30

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James B. Zongker, P.O. Box 47370, Wichita, Kansas 67201-7370
David J. Morgan, 100 S Main, 600 Hardage Center, Wichita, Kansas 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director